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# Civil Procedure - Depositions and Discovery: Punishing Little Suzy for Daddy's Bad Behavior - North Dakota Supreme Court Affirms Rule 37 Sanctions Affecting Child Support Determinations

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# CIVIL PROCEDURE—DEPOSITIONS AND DISCOVERY: PUNISHING LITTLE SUZY FOR DADDY'S BAD BEHAVIOR—NORTH DAKOTA SUPREME COURT AFFIRMS RULE 37 SANCTIONS AFFECTING CHILD SUPPORT DETERMINATIONS

*Barth v. Barth,* 1999 ND 91, 593 N.W.2d 359

## I. FACTS

Nancy A. and Dale W. Barth married in 1988 and had three children.[1] Dale and Nancy lived in a mobile home on Dale's parents' farmstead and leased cropland and equipment from his father, Otto Barth, for $20,000 per year.[2] The parties separated in February 1997, at which time Nancy and the children left the family home.[3]

The trial court granted Nancy a divorce from Dale and gave her custody of the three children.[4] The trial court awarded Dale four hours of supervised visitation with the children on the first and third weekends of each month and ordered Dale to pay child support in the amount of $452 per month.[5] The trial court awarded Nancy property valued at $13,193 and debt in the amount of $8,902, for a net property distribution of $4,291.[6] Dale received a net award of $38,125, after the trial court apportioned property to him valued at $69,375 and debt of $31,250.[7] The trial court ordered Dale to pay Nancy $16,917 on or before July 1, 1998, in order to equalize property and debts.[8] Dale

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1. *See* Barth v. Barth, 1999 ND 91, ¶ 2, 593 N.W.2d 359, 361.

2. *See id.* Dale entered into a written lease agreement with his father whereby he rented certain cropland and equipment from his father. *See* Appellant's Brief at 3, *Barth* (No. 980241).

3. *See Barth*, ¶ 2, 593 N.W.2d at 361. Both parties alleged infidelity against the other: Nancy claimed she and her oldest daughter Danica saw Dale and a woman in a van with their pants off late one evening; Dale claimed Nancy and her sister-in-law brought home two men after drinking at a local bar. *See* Appellant's Brief at 4-5, *Barth* (No. 980241).

4. *See Barth*, ¶ 3, 595 N.W.2d at 361. Danica Oberlander was born in 1981, Desirae Barth was born in 1988, and Deriann Barth was born in 1992. *See id.* ¶ 2.

5. *See id.* ¶ 3. The visitation was required to be supervised because of an incident in November of 1996 when Danica confronted Dale and called him a "drunk." *See* Barth v. Barth, No. 97-C-1009, N.D. BRIEF REP., 593 N.W.2d(1) at 173 (S. Cent. Dist. Ct. May 6, 1998), *aff'd*, 1999 ND 91, 593 N.W.2d 359. Dale responded by shoving and slapping Danica. *See id.* Nancy Barth reported the incident to Oliver County Social Services, which subsequently concluded that the allegation of domestic violence was true and recommended that Dale attend an anger management class. *See id.*

6. *See Barth*, ¶ 3, 593 N.W.2d at 361. The debt awarded to Nancy encompassed the total amount due on a Ford Aspire, which she purchased after separating with Dale. *See* Property and Debt Listing, Barth v. Barth, No. 97-C-1009, N.D. BRIEF REP., 593 N.W.2d(1) at 36-38.

7. *See Barth*, ¶ 3, 593 N.W.2d at 361. The debt awarded to Dale included the $20,000 lease to his father, $1,150 for attorney fees, $500 for parts, $3,000 to Grey Oil for fuel, $3,400 to Minnkota, $350 to J.C. Penney, $250 to Target, $300 to Daytons, $2,000 to AT&T MasterCard, and $400 to MedCenter One. *See* Barth v. Barth, No. 97-C-1009, N.D. BRIEF REP., 593 N.W.2d(1) at 176 (S. Cent. Dist. Ct. May 6, 1998).

8. *See id. See generally* N.D. CENT. CODE § 14-05-24 (1997) (stating a post-marital division of property must be "just and proper").

contended that the division of property and the calculation of his income were clearly erroneous and requested reversal and an adjustment of the trial court's division of property and income determination.[9]

Dale's complaint concerning the division of property was premised on three quarters of land, which he and his father purchased on a contract for deed in 1991,[10] and on Nancy's interest in one quarter of land that she brought into the marriage.[11] Dale's complaint concerning the income determination centered around his 1996 income, in which the trial court included unreported income of $20,000[12] and grain sales in the amount of $35,848.19.[13] Dale also contended on appeal that the trial court erred in excluding farm expense deductions of $45,271 in his 1997 income determination.[14]

The trial court found that Dale failed to comply with discovery requests[15] and court orders[16] that required him to divulge information regarding his income over the past five years.[17] As a sanction for discovery abuse, the trial court did not deduct $45,271 in 1997 farm expenses when calculating Dale's income.[18] Dale contended that the total disallowance of 1997 farm expenses was an "abuse of discretion and contrary to law."[19]

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9. *See Barth*, ¶ 4, 593 N.W.2d at 361.

10. *See id.* ¶ 5, 593 N.W.2d at 361-62. Dale maintained at trial that his name was on the contract for deed as a matter of convenience and that he had no interest in the property. *See* Appellee's Brief at 6, *Barth* (No. 980241).

11. *See Barth*, ¶¶ 5, 6, 593 N.W.2d at 361-62. Dale contended the trial court erred in not including in the post-marriage division of property the $11,000 that Nancy received as a part of her one-eighth interest in land that was sold in 1997. *See id.* The trial court elected not to consider the interest in the sale of Nancy's land because she used the proceeds from the sale to support her move out of the house and to pay various debts attendant with the move and separation from Dale. *See id.*

12. *See id.* ¶ 23, 593 N.W.2d at 364. Dale deducted $20,000 on his 1996 tax return for the rent, but he did not report the income from grain sold in his father's name to pay the rent. *See id.* Dale testified at the initial interim hearing that he had given his father grain valued at $20,000 to pay for the 1996 lease, a transaction characterized by the trial court as an unreported barter transaction. *See* Appellee's Brief at 10, *Barth* (No. 980241).

13. *See Barth*, ¶ 23, 593 N.W.2d at 364. The office manager at the Benson-Quinn Grain Elevator in Underwood testified that she issued Dale a check on January 12, 1996, for grain sold in the amount of $35,848.19. *See id.* ¶ 25.

14. *See id.* ¶ 22.

15. *See id.* ¶ 31, 593 N.W.2d at 365. Dale refused to sign the Rule 8.3 Informational Statement and also refused to furnish numerous other documents subpoenaed by Nancy. *See* Appellee's Brief at 3, *Barth* (No. 980241). North Dakota Court Rule 8.3 provides a blueprint for managing a divorce case; it mandates that a joint informational statement be drafted including information pertaining to child custody, property disputes, spousal support, discovery, and a preliminary property and debt listing.

16. *See Barth*, ¶ 31, 593 N.W.2d at 365. Court orders dated October 14, 1997; November 18, 1997; February 5, 1998; and March 23, 1998, all commanded Dale to comply with discovery requests, and Dale was held in contempt of court on the later three decree dates as a result of his noncompliance. *See id.* ¶¶ 31-32, 593 N.W.2d at 365-66.

17. *See id.* ¶ 27, 593 N.W.2d at 364.

18. *See id.*

19. *Id.* Dale contended that because this sanction had such a substantial affect on his child

On appeal, the North Dakota Supreme Court *held* that the trial court's division of property was not clearly erroneous because the Supreme Court was not left with a firm and definite conviction that a mistake had been made in the distribution of the marital estate.[20] The court further *held* that the refusal to consider farm expenses in calculating Dale's income for purposes of determining child support obligations was an appropriate sanction for discovery violations because it was not an abuse of discretion by the trial court.[21]

## II. LEGAL BACKGROUND

North Dakota law dictates that post-marital divisions of property follow the equitable distribution doctrine.[22] The determination of what constitutes an equitable division of property is predicated on what are collectively termed the Ruff-Fisher guidelines.[23] A court determines the property to be equitably divided through various discovery devices, including interrogatories and financial disclosure statements.[24] North Dakota Rule of Civil Procedure 37 sets forth the sanctions that are available to a court to punish a party who has committed an abuse of discovery.[25]

### A. DIVORCE AND EQUITABLE DISTRIBUTION—THE RUFF-FISHER GUIDELINES

An equitable post-marital division of property is accomplished using a combination of statutory and common law principles.[26] North Dakota courts adopted the common law Ruff-Fisher guidelines in order to efficiently effectuate the statutory equitable distribution doctrine.[27]

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support, he was left with an "uncertain, open ended, and continuing penalty." Appellant's Brief at 12, *Barth* (No. 980241).

20. *See Barth*, ¶ 21, 593 N.W.2d at 364.

21. *See id.* ¶¶ 21, 35, 593 N.W.2d at 364, 367.

22. *See* N.D. CENT. CODE § 14-05-24 (1997). The codified equitable distribution doctrine states:

> When a divorce is granted, the court shall make such equitable distribution of the real and personal property of the parties as may seem just and proper, and may compel either of the parties to provide for the maintenance of the children of the marriage, and to make such suitable allowances to the other party for support during life or for a shorter period as to the court may seem just, having regard to the circumstances of the parties respectively. The court may from time to time modify its orders in these respects.

*Id.*

23. *See* Volk v. Volk, 376 N.W.2d 16, 18 (N.D. 1985) (stating that in order to reach an equitable distribution of property a court should be guided by the Ruff-Fisher guidelines).

24. *See Barth*, ¶ 31, 593 N.W.2d at 365 (stating that the trial court ordered Dale to answer interrogatories and comply with other discovery requests).

25. *See* N.D. R. CIV. P. 37.

26. *See Volk*, 376 N.W.2d at 18 (stating that section 14-05-24 of the North Dakota Century Code governs a court's property distribution in a divorce action and the common law Ruff-Fisher guidelines guide a court in effectuating the statutory law).

27. *See Barth*, ¶ 8, 593 N.W.2d at 362 (stating that only after all statutory requirements are met may a court properly apply the Ruff-Fisher guidelines).

The statutorily defined equitable distribution doctrine and its goal of a "just and proper" division of property are accomplished through the application of the Ruff-Fisher guidelines.[28]

The principle behind the equitable distribution doctrine is to divide property between spouses according to either need or equity without regard to title or ownership.[29] A variant of the equitable distribution doctrine governs the division of property in all common law states and most community property states.[30] The dominant equitable distribution model has two basic, yet conflicting, principles.[31] First, property should be allocated in proportion to the contributions of each spouse; and second, property should be allocated according to the relative needs of each spouse.[32] The North Dakota Century Code codifies this dichotomy by stating, "[T]he court shall make such equitable distribution of the real and personal property of the parties as may seem just and proper, . . . having regard to the circumstances of the parties."[33] Accordingly, as long as the court adequately analyzes the circumstances of the parties, a post-marital division of property need not be equal in order to be equitable.[34]

In 1952, the North Dakota Supreme Court stated that a court is required to make an equitable distribution of real and personal property as "may seem just and proper," depending on the circumstances of each particular case.[35] The court stated that the ultimate object to be

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28. *See id.*

29. *See* IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 249 (3d ed. 1998). The laws of property normally divide property between individuals according to title and ownership without regard to what is equitable to the parties. *See id.*; *see also* Kautzman v. Kautzman, 1998 ND 192, ¶ 15, 585 N.W.2d 561, 565 (stating that a property division in North Dakota is premised on principles of equity rather than on traditional property or partnership law).

30. *See* ELLMEN ET AL., *supra* note 29, at 249. The only community property states that follow a strict rule of equal division of marital property based on title are California, New Mexico, and Arizona. *See* ELLMEN ET AL., *supra* note 29, at 249. No other community property states or common law states, including North Dakota, divide property upon divorce entirely according to the strict rule of equal division. *See* ELLMEN ET AL., *supra* note 29, at 249.

31. *See* ELLMEN ET AL., *supra* note 29, at 249.

32. *See* ELLMEN ET AL., *supra* note 29, at 269 (quoting PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 4.15 cmt. a (A.L.I. Proposed Final Draft, Part I, 1997)).

33. N.D. CENT. CODE § 14-05-24 (1997). In the 1947 case of *Agrest v. Agrest*, 27 N.W.2d 697, 703 (N.D. 1947), the North Dakota Supreme Court, discussing the statutory requirements of a "just and proper" division of property, stated:

> Inasmuch as [the 1943 North Dakota revised code section 14-0524 (now North Dakota Century Code section 14-05-24)] and cognate statutes contain no statutory enumeration of the "circumstances" to be considered in making an "equitable distribution," it logically follows that the division of property or adjustment of property rights upon a divorce generally depends on the facts and circumstances of the particular case.

34. *See* Christmann v. Christmann, 1997 ND 209, ¶ 6, 570 N.W.2d 221, 223 (stating that while a court should begin with an equal property division, the division need not be exactly equal to be equitable).

35. *See* Ruff v. Ruff, 52 N.W.2d 107, 111 (N.D. 1952) (citing Casciola v. Casciola, 27 N.W.2d 65, 66 (Mich. 1947); Byrne v. Byrne, 24 N.W.2d 173, 175-76 (Mich. 1946); Jensen v. Jensen, 15

sought in the division of property was "an equitable distribution."[36] In *Ruff v. Ruff*,[37] the North Dakota Supreme Court reaffirmed a lower court division of property resulting from a divorce granted on the grounds of extreme cruelty by the husband.[38] The parties in *Ruff* entered the marriage with approximately equal assets and through "diligent and industrious" work by both parties managed to accumulate significant property and assets.[39] In affirming the trial court's division of property, the court adopted a rule from a line of Nebraska Supreme Court decisions that outlined relevant elements to be considered when equitably distributing marital property.[40]

In 1966, the North Dakota Supreme Court reinforced the guidelines set forth in *Ruff* through *Fisher v. Fisher*.[41] In *Fisher*, the North Dakota Supreme Court affirmed the trial court's division of land acquired through the joint efforts of a husband and wife during a thirty-year marriage.[42] The elements examined in *Ruff* and *Fisher* form the basis of what are known as the Ruff-Fisher guidelines which allow a court to consider the following:

> the respective ages of the parties to the marriage; their earning ability; the duration of and conduct of each during the marriage; their station in life; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by property owned at the time, its value at that time, its income-producing capacity, if any, and whether accumulated or acquired before or after marriage; and from all such elements the court should determine the rights of the parties and all other matters pertaining to the case.[43]

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N.W.2d 57, 63 (Neb. 1944); Caldwell v. Caldwell, 237 N.W. 568, 569 (S.D. 1931)).

36. *Id.* (stating no rigid rule exists for the division of property).

37. 52 N.W.2d 107 (N.D. 1952).

38. *See Ruff*, 52 N.W.2d at 110. The allegations accepted by the court included physical abuse, resulting in grievous bodily injury, and mental abuse, resulting in grievous mental suffering, which stemmed from incidents of domestic violence and marital infidelity. *See id.*

39. *See id.* at 111. The court determined that each entered the marriage with six or seven cows and by the end of the 12-year marriage they had accumulated 640 acres of land with associated buildings worth $19,200. *See id.*

40. *See* Ristow v. Ristow, 41 N.W.2d 924, 926 (Neb. 1950) (reaffirming that in an alimony or property division determination the factors first set forth in *Swolec v. Swolec*, 241 N.W. 771, 773 (Neb. 1932), apply). In *Swolec*, the Nebraska court stated that because the trial court has broad discretion in determining alimony and property division, certain factors need be considered. *See* 241 N.W.2d at 773; *see also* Holmes v. Holmes, 41 N.W.2d 919, 921 (Neb. 1950) (reiterating the holding in *Swolec*, 241 N.W.2d at 773, that certain factors are to be looked at in determining alimony or a division of property in a divorce proceeding).

41. 139 N.W.2d 845 (N.D. 1966).

42. *See* Fisher v. Fisher, 139 N.W.2d 845, 854 (N.D. 1966) (finding a division awarding 400 acres of land including the homestead to the wife, and 440 acres of land to the husband, equitable under all the facts and circumstances).

43. *Ruff*, 52 N.W.2d at 111 (adopting factors to be examined in the determination of an equitable division of property in a post marriage property division); *see also* Tuff v. Tuff, 333 N.W.2d 421, 423 (N.D. 1983) (stating that while no set rules apply in the equitable distribution of property, the

The Ruff-Fisher guidelines allow a court to consider and balance all of the relevant factors in a post-marriage division of property without any one factor weighing more heavily than any other does.[44] Each factor of the Ruff-Fisher guidelines should be considered by a court in equitably distributing property and must be reasonably discernible by inference or deduction.[45] Subsequent cases have further defined and clarified the common law Ruff-Fisher guidelines.[46]

A trial court's determination regarding valuation and division of marital property is treated as a finding of fact and will be reversed on appeal only if it is clearly erroneous.[47] Absent a firm and definite conviction that a mistake has been made, a reviewing court will not make a finding that a division of property is clearly erroneous.[48] Further, a finding of fact may be deemed clearly erroneous only if it was induced by an erroneous view of the law or if there was no evidence to support the fact.[49]

The North Dakota Legislature and the North Dakota Supreme Court have set forth specific statutory and common law requirements regulating the post-marital division of property.[50] Although a post-marital division of property is not always equal, an equitable division of property is best achieved through application of the Ruff-Fisher guidelines that have been adopted and defined by the North Dakota Supreme Court.[51] In order to ensure that a proper application of the Ruff-Fisher guidelines occurs, a party must comply with all disclosure of information requirements set forth in the rules of discovery.[52]

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Ruff-Fisher guidelines should be considered); *Fisher*, 139 N.W.2d at 851-52 (stating it logically follows that, "the division of property or adjustment of property rights upon divorce generally depends on the facts and circumstances of the particular case").

44. *See* Blowers v. Blowers, 377 N.W.2d 127, 129 (N.D. 1985) (stating express findings of each Ruff-Fisher guideline are not necessary).

45. *See* Lentz v. Lentz, 353 N.W.2d 742, 745 (N.D. 1984) (citing Winter v. Winter, 338 N.W.2d 819, 822 (N.D. 1983); Nastrom v. Nastrom, 284 N.W.2d 576, 581 (N.D. 1979)).

46. *See, e.g.*, Kautzman v. Kautzman, 1998 ND 192, ¶ 9, 585 N.W.2d 561, 564 (reinforcing the court's application of the Ruff-Fisher guidelines in equitably distributing property in a post-marriage division of property); Anderson v. Anderson, 390 N.W.2d 554, 556 (N.D. 1986) (holding the length of a marriage in which traditional provider/homemaker roles are assumed still mandates the application of Ruff-Fisher guidelines and that in a long-term marriage an equal division is presumed); *Nastrom*, 284 N.W.2d at 581 (affirming trial court's application of the Ruff-Fisher guidelines concerning age and income earning ability).

47. *See* Grinaker v. Grinaker, 553 N.W.2d 204, 208 (N.D. 1996) (citing Volson v. Volson, 542 N.W.2d 754, 756 (N.D. 1996)). *See generally* N.D. R. CIV. P. 52(a) (stating that "findings of fact . . . shall not be set aside unless clearly erroneous").

48. *See Grinaker*, 553 N.W.2d at 208.

49. *See Kautzman*, ¶ 8, 585 N.W.2d at 564 (citing Gierke v. Gierke, 1998 ND 100, ¶ 15, 578 N.W.2d 522, 526).

50. *See generally* N.D. CENT. CODE § 14-05-24 (1997); Barth v. Barth, 1999 ND 91, ¶ 8, 593 N.W.2d 359, 362.

51. *See Kautzman*, ¶ 7, 585 N.W.2d at 564 (stating a post-marital division of property does not have to be equal to be equitable).

52. *See Barth*, ¶ 29, 593 N.W.2d at 365 (stating complete compliance with discovery requests is required).

### B. RULE 37—FAILURE TO MAKE OR COOPERATE IN DISCOVERY; SANCTIONS

Both the processes by which parties accumulate information for a lawsuit and the rules governing this process are collectively termed "discovery."[53] Discovery occurs in a variety of methods and manners and aids both sides to litigate effectively and efficiently.[54] Courts may impose penalties against a party for failing to adequately provide all relevant information pertinent to ongoing or impending litigation.[55]

North Dakota Rule of Civil Procedure 37 authorizes a court to impose sanctions on a party for failing to make or cooperate in discovery.[56] North Dakota Rule 37 is based on Rule 37 of the Federal Rules of Civil Procedure.[57] First adopted in 1938, Federal Rule 37 was entitled "Refusal to Make Discovery; Consequences."[58] Except for a minor change in 1949,[59] Federal Rule 37 remained unchanged until 1970, when its language was modified considerably but not its scope or substance.[60]

The advisory committee notes accompanying the 1970 amendment indicated that "[e]xperience has brought to light a number of defects in the language of the rule as well as instances in which it is not serving the purposes for which it was designed."[61] The major textual revision of Rule 37 of the Federal Rules of Civil Procedure, through the 1970

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53. *See generally* N.D. R. CIV. P. 26 (covering general provisions of discovery); N.D. R. CIV. P. 27 (concerning depositions before an action or pending appeal); N.D. R. CIV. P. 28 (detailing the persons before whom depositions may be taken); N.D. R. CIV. P. 29 (detailing stipulations regarding discovery procedures); N.D. R. CIV. P. 30 (setting forth the requirements for depositions upon oral examination); N.D. R. CIV. P. 30.1 (detailing the uniform audiovisual deposition rule); N.D. R. CIV. P. 31 (concerning depositions of witnesses upon written questions); N.D. R. CIV. P. 32 (detailing the use of depositions in court proceedings); N.D. R. CIV. P. 33 (covering interrogatories); N.D. R. CIV. P. 34 (detailing the requirements for the production of documents and things and entry upon land for inspection and other purposes); N.D. R. CIV. P. 35 (covering the mental and physical examinations of persons); N.D. R. CIV. P. 36 (concerning requests for admission); N.D. R. CIV. P. 37 (detailing sanctions available for non-compliance with any discovery rules).

54. *See generally* N.D. R. CIV. P. 26-36.

55. *See generally* N.D. R. CIV. P. 37 (granting courts broad discretion in imposing sanctions/penalties for failing to provide requested information).

56. *See id.* (stating a court may impose sanctions against a party for failing to provide requested information).

57. *See* Thompson v. Ziebarth, 334 N.W.2d 192, 193 (N.D. 1983) (stating North Dakota Federal Rules of Civil Procedure 37 is patterned after Federal Rules of Civil Procedure 37). *See generally* 8A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2284 (2d. ed. 1994 & Supp. 2000).

58. *See id.* at 558 n.1.

59. This change brought up to date a statutory reference in subdivision (e) that substituted "Title 28 U.S.C. § 1783" for the statutory reference of "Title 28 U.S.C. § 711," which originally appeared in the subdivision. *See* WRIGHT ET AL., *supra* note 57, at 589 n.1.

60. *See* WRIGHT ET AL., *supra* note 57, § 2281, at 597 (discussing the purpose and history of the rule).

61. 48 F.R.D. 487, 538 (1970).

amendment, was to clarify dual terminology in the original rule.[62] Rule 37 of the Federal Rules of Civil Procedure in its original form was inconsistent, because it referred to a "failure" to afford discovery in some sections and in other sections referred to a "refusal" to afford discovery.[63] This inconsistency in terminology led to different interpretations by lower courts.[64] For example, some courts interpreted "refusal" to require "willfulness," despite a U.S. Supreme Court ruling stating the use of the two words implied no distinct meaning and that they were fairly interchangeable.[65] In response to the confusion between the meaning and application of the two words, the advisory committee substituted the word "failure" for the word "refusal" throughout the rule in order to promote uniformity of interpretation.[66]

Other changes brought by the 1970 amendment included the broadening of Rule 37 subsection (a).[67] Prior to the 1970 amendment, subsection (a) formally allowed only an order to compel answers to questions at a deposition or compel answers to interrogatories.[68] The 1970 amendment broadened subsection (a) to include all discovery devices, except physical and mental exams because those require a court order.[69] The amendment further specified the appropriate court for making a Rule 37 motion.[70] The awarding of attorney's fees for frivolous requests was also broadened in the hopes of inducing courts to grant these types of awards more frequently.[71] A number of other changes were made to Rule 37 in 1970 to comport with other discovery rule changes and to

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62. *See id.*

63. *See id.*

64. *See id.*

65. *See id. See generally* Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 207-08 (1958) (concluding that the random use of the two terms in Rule 37 did not show a design for them to be used with consistently distinctive meanings, that "refused" simply meant a failure to comply, and that "willfulness" only applied to the actual sanction applied).

66. *See* 48 F.R.D. 487, 539 (1970) (stating the substitution should bring the rule into harmony with *Societe Internationale*).

67. *See* WRIGHT ET AL., *supra* note 57, § 2281 at 597. The 1970 addition to Rule 37(a)(3) allowed a court to treat an incomplete or evasive answer as a failure to answer. *See* WRIGHT ET AL., *supra* note 57, § 2285 at 644.

68. *See* WRIGHT ET AL., *supra* note 57, § 2281 at 597. With the 1970 amendment, Rule 37(a) made a motion to compel discovery applicable to inspection of documents and things under Rule 34. *See* WRIGHT ET AL., *supra* note 57, § 2285 at 642. Prior to this amendment, a court order under Rule 34 was a prerequisite to an inspection, and Rule 37(a) was not necessary. *See* WRIGHT ET AL., *supra* note 57, § 2285 at 642. The amendment made inspection permissible without a court order. *See* WRIGHT ET AL., *supra* note 57, § 2285 at 642.

69. *See* WRIGHT ET AL., *supra* note 57, § 2281 at 597.

70. *See* WRIGHT ET AL., *supra* note 57, § 2281 at 597. Prior to the 1970 amendments, Rule 37 did not specify which court had power to act when a deposition was being taken in one district for use in a case pending in another district. *See* WRIGHT ET AL., *supra* note 57, § 2287 at 650.

71. *See* WRIGHT ET AL., *supra* note 57, § 2281 at 598. The Advisory Committee's Notes stated the change was intended to encourage judges to be more alert to discovery abuses because, before 1970 courts were extremely reluctant to impose sanctions. *See* 48 F.R.D. 487, 539 (1970).

clarify unclear points.[72] Minor changes in Rule 37 also occurred in 1980[73] and 1993.[74]

A Rule 37 sanction appeal will be reviewed under an abuse of discretion standard and will only be set aside on appeal if there has been an abuse of that discretion by the trial court.[75] Courts and commentators, however, have had difficulty defining abuse of discretion.[76] Abuse of discretion has been defined in a wide variety of cases and contexts, including acts or decisions outside the normal course of proceedings, actions stepping outside the limits of discretion, decisions in error as a matter of law, and arbitrary or capricious actions.[77] The North Dakota Supreme Court has held that a trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner.[78] Firm, definite rules concerning the imposition of discovery sanctions are rare.[79] Principle concerns of an appellate court reviewing a district court decision are the timing and severity of sanctions to be imposed by the lower courts.[80] However, the power to impose discovery sanctions is limited despite the broad discretion afforded to trial courts.[81]

Constitutional limits associated with Rule 37 sanctions are grounded in the Due Process Clause of the Fifth and Fourteenth Amendments.[82] One due process issue courts must address when imposing sanctions is

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72. *See* WRIGHT ET AL., *supra* note 57, § 2281 at 598. These changes included the broadening of Rule 37(c) to provide for an award of expenses if a party refused to make an admission under Rule 36 and a clarification of what needed to be shown in order to avoid the awarding of expenses. *See* WRIGHT ET AL., *supra* note 57, § 2281 at 598.

73. *See* WRIGHT ET AL., *supra* note 57, § 2281 at 599 (abrogating Rule 37(e) because neither Rule 37(e) nor the statute to which it referred, 28 U.S.C. § 1783 (stating when a court may issue a subpoena for a person or document in a foreign country) was related in any way to sanctions for discovery abuses). *See* WRIGHT ET AL., *supra* note 57, § 2292 at 736.

74. *See* WRIGHT ET AL., *supra* note 57, § 2281 at 599-600 (imposing a meet and confer requirement, adding an inclusion of evidence provision, and changing the provisions for identifying the appropriate courts).

75. *See* Wolf v. Estate of Seright, 1997 ND 240, ¶ 17, 573 N.W.2d 161, 165 (stating a trial court has discretionary authority to decide appropriate sanctions for a failure to supplement interrogatories and those decisions will only be reviewed under an abuse of discretion standard).

76. *See* 1 C.J.S. *Abuse* 392 (1985).

77. *See id.* at 394.

78. *See* Towne v. Dinius, 1997 ND 125, ¶ 14, 565 N.W.2d 762, 766 (finding the trial court did not abuse its discretion by ordering the payment of attorney's fees because the court did not act "arbitrarily, unreasonable, or unconscionably").

79. *See* WRIGHT ET AL., *supra* note 57, § 2284 at 613. Flexibility of the rule is necessary because the needs of the discovering party as well as the nature of the noncompliance often need to be evaluated. *See* WRIGHT ET AL., *supra* note 57, § 2284 at 613 n.2.

80. *See* WRIGHT ET AL., *supra* note 57, § 2284 at 613.

81. *See* WRIGHT ET AL., *supra* note 57, § 2284 at 613.

82. *See* WRIGHT ET AL., *supra* note 57, § 2283 at 605. *See generally* U.S. CONST. amends. V, XIV (standing for the general proposition that no person shall be deprived of life, liberty, or property without due process of law). Rule 37 sanctions allow a court to enter a default judgment and or strike pleadings and answers, and therefore, these sanctions may implicate due process concerns. *See generally* N.D. R. CIV. P. 37.

the relationship between the discovery and the merits that will be foreclosed by the sanction.[83] That relationship must be sufficient to justify depriving the party of the opportunity to litigate the claim based on those merits.[84] The Tenth Circuit Court of Appeals held in *Brown v. McCormick*[85] that discovery sanctions assessed in an arbitrary manner are violative of due process and a judgment based on those sanctions is void.[86] In *Brown,* the appellants failed to appear for a deposition, and the court ordered their pleadings to be stricken as a Rule 37 sanction.[87] The court found that because of appellants "dilatory tactics," and the fact that their attorney had notice of the default hearing, no due process violation occurred.[88] Next, to ensure that due process is properly served, the ability of the party to comply with the discovery request should be addressed before a court imposes a serious "merits sanction."[89]

However, in *Hovey v. Elliott,*[90] the U.S. Supreme Court determined that refusal of all rights to defend an action or to issue a judgment without any hearing whatsoever denies an individual due process of law.[91] In *Hovey,* the court entered a decree *pro confesso*[92] against the defendants and struck their answer as a result of a refusal to obey an order by the court pertinent to the suit pending against them.[93] Justice White found that to deny the defendants the right to defend would run counter to the judicial system and would, in effect, "convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."[94] Accordingly, a sanction must have limits and cannot completely deprive an individual of due process rights.[95]

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83. *See* WRIGHT ET AL., *supra* note 57, § 2283 at 605.

84. *See* WRIGHT ET AL., *supra* note 57, § 2283 at 605.

85. 608 F.2d 410 (10th Cir. 1979).

86. Brown v. McCormick, 608 F.2d 410, 414-15 (10th Cir. 1979) (holding a default judgment was valid and Rule 37 sanctions were not violative of due process when notice of default judgment hearing is provided to a litigant's attorney).

87. *See id.* at 412. Appellants had several attorneys withdraw as counsel and were issued several extensions. *See id.*

88. *See id.* at 414.

89. *See* WRIGHT ET AL., *supra* note 57, § 2283 at 605.

90. 167 U.S. 409 (1897).

91. *See* Hovey v. Elliott, 167 U.S. 409, 413-14 (1897) ("The fundamental conception of a court of justice is condemnation only after [a] hearing.").

92. A decree *pro confesso* is "one entered in favor of the plaintiff as a result of the defendant's failure to timely respond to the allegations in the plaintiff's bill." BLACK'S LAW DICTIONARY 419 (7th ed. 1999).

93. *See Hovey,* 167 U.S. at 411-12. The Supreme Court of the District of Columbia struck the defendants' answer after they refused to pay $49,297.50 to the registry of the courts that had been previously paid to them by the receiver in a land claim. *See id.*

94. *Id.* at 414.

95. *See id.*

The Supreme Court distinguished the *Hovey* decision in the 1909 case of *Hammond Packing Co. v. Arkansas.*[96] In *Hammond*, the defendant defied a court order by refusing to produce information before a commissioner concerning an action under Arkansas antitrust law.[97] As a result of the noncompliance, the court struck the company's answer and a default judgment was granted.[98] In affirming the state court decision, Justice White stated that the striking out of the answer and entering of default judgment was a punishment, but only remotely so, "as the generating source of the power was the right to create a presumption flowing from the failure to produce."[99] Justice White found *Hovey* distinguishable from this case because it involved a "denial of all right to defend as a mere punishment" that denied due process by a refusal to hear.[100] In *Hammond,* on the other hand, "[t]he preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense."[101]

Forty-nine years later, in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*,[102] the Supreme Court returned to the due process concerns of *Hovey* and *Hammond*.[103] In *Societe Internationale,* a Swiss holding company brought an action against the United States Attorney General and the Treasurer of the United States to recover property seized during World War II as property owned by an enemy national.[104] The lower court dismissed the plaintiff's action because it failed to comply with an order to produce documents, even though the plaintiff made a good faith effort to comply with the order.[105] The Supreme Court reversed the lower court decision, stating, "we think that Rule 37 should not be construed to authorize

96. 212 U.S. 322 (1909).

97. *See* Hammond Packing Co. v. Arkansas, 212 U.S. 322, 339 (1909). The requested information included "numerous books, papers, and documents bearing upon the issues in this cause and relevant to the claim." *Id.* at 337.

98. *See id.* at 340.

99. *Id.* at 351; *see also* Hovey v. Elliott, 167 U.S. 409, 446-47 (1897).

100. *Hammond*, 212 U.S. at 351; *see also Hovey*, 167 U.S. at 444.

101. *Hammond*, 212 U.S. at 351.

102. 357 U.S. 197 (1958).

103. *See* Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers, 357 U.S. 197, 209-10 (1958); *see also Hammond*, 212 U.S. at 325; *Hovey*, 167 U.S. at 414-19.

104. *See Societe Internationale*, 357 U.S. at 198-99. The assets, valued at over $100,000,000, consisted of cash in American banks and stocks in a Delaware corporation. *See id.* at 199. The Swiss company brought action under section 9(a) of the Trading with the Enemy Act. *See* 50 U.S.C. app., § 9(a) (1994). This section authorizes recovery of assets by a person not an enemy or ally of an enemy that has a legal interest in those assets. *See id.*

105. *See Societe Internationale*, 357 U.S. at 200. The petitioner moved to be relieved from producing the documents on the grounds that disclosure of the required records would violate Swiss law and might lead to the imposition of criminal sanctions against it. *See id.*

dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when . . . that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."[106] Thus, *Societe Internationale* held that a failure to respond to a court order, despite a good faith effort at compliance, is noncompliance and brings Rule 37 into play, but the sanction of dismissal cannot be imposed if the failure was caused by an inability to comply.[107]

The procedural environment in which Rule 37 exists distinguishes between two types of misconduct: evasive or incomplete answers and a complete failure to respond to discovery requests.[108] Rule 37 provides for a multi-step analysis in the examination of an evasive or incomplete answer[109] and a one-step process where there is a complete failure to respond.[110] In cases of incomplete or evasive answers by a party to deposition questions or interrogatories, Rule 37 allows the court to require the party whose conduct necessitated the motion, the attorney advising the conduct, or both, to pay the moving party reasonable expenses incurred in making the motion, including attorney's fees.[111] Furthermore, when a party refuses or fails to comply with a court question or an order in a deposition, Rule 37 allows a judge to hold the party in contempt.[112] If a party fails to obey an order by the court in which the action is pending, the court may issue orders relating to that failure which are determined to be just.[113] Some states, such as North Dakota, have patterned their state civil procedure Rule 37 and its interpretation after the federal rule.[114]

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106. *Id.* at 212.

107. *See id.* at 212-13.

108. *See* Adam Behar, Note, *The Misuse of Inherent Powers When Imposing Sanctions For Discovery Abuse: The Exclusivity of Rule 37*, 9 CARDOZO L. REV. 1779, 1779-80 (1988) (questioning the courts' need to resort to inherent powers to impose sanctions for discovery abuse in light of an existing governing rule). *See generally* N.D. R. CIV. P. 37(a)(3) (stating that evasive or incomplete answers are to be treated as a failure to answer); N.D. R. CIV. P. 37(b)(1) (stating that failure to comply with an order may be considered a contempt of that court).

109. *See* N.D. R. CIV. P. 37(a) (setting forth the methodology of first making a motion compelling discovery and only then employing court imposed expenses and sanctions).

110. *See* N.D. R. CIV. P. 37(b)(1) (stating failure by a deponent to answer a question after being asked may be considered contempt of court); *see also* Behar, *supra* note 108, at 1779.

111. *See* N.D. R. CIV. P. 37(a)(4)(A) (outlining the expenses and sanctions available).

112. *See* N.D. R. CIV. P. 37(b)(1) ("If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the judicial district in which the deposition is being taken, the failure may be considered a contempt of that court.").

113. *See* N.D. R. CIV. P. 37(b)(2). These orders include, but are not limited to: (1) an order that matters regarding the order made or any other facts will be treated as established for the purposes of the action in agreement with the claim of the party obtaining the order; (2) an order refusing to allow the insubordinate party to support or oppose designated claims or prohibiting that party from introducing designated matters in evidence; (3) or an order striking all or some pleadings, staying proceedings until the order is obeyed, dismissing the action, or rendering a default judgment. *See id.*

114. *See generally* N.D. R. CIV. P. 37.

Accordingly, the North Dakota Supreme Court applies "interpretive federal caselaw" in construing the application of Rule 37 in North Dakota.[115] Sanctions for discovery abuse serve two purposes:[116] first, as a penalty against those whose conduct is deemed to merit a sanction, and second, as a deterrent to others.[117] In all its forms, discovery is the "make or break device of the whole system," and unless discovery rules function in the appropriate way, litigants may be unprepared and issues in the case may be broad and underdeveloped.[118] The North Dakota Supreme Court has found that the need to deter discovery abuses, promote efficient litigation, and protect the interests of the parties justifies resolving a case on its merits.[119]

The North Dakota Supreme Court recognized the importance of complying with a discovery request in *Vorachek v. Citizens State Bank*,[120] which held that a party is not at liberty to "pick and choose" the information to be provided or withheld in an action.[121] The court stated that the rules of civil procedure require complete, accurate, and timely compliance.[122] The court further stated that selective and substantial compliance is not enough.[123] Thus, the court held that the discovery process would be "rendered useless" if parties were allowed to withhold certain information because they had previously provided a portion of the requested information.[124] The court listed effective litigation and the

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115. Vorachek v. Citizens State Bank, 421 N.W.2d 45, 49 (N.D. 1988) (citing as examples, Shark v. Thompson, 373 N.W.2d 859, 863 (N.D. 1985); St. Aubbin v. Nelson, 329 N.W.2d 874, 876 (N.D. 1983)).

116. *See* Bachmeier v. Wallwork Truck Ctrs., 507 N.W.2d 527, 533 (N.D. 1993).

117. *See generally* National Hockey League v. Metropolitan Hockey Club Inc., 427 U.S. 639 (1976) (stating sanctions for discovery abuses are available not only to penalize discovery abuses but also to deter them); *see also* Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 483 (1958) (stating that to be efficient, effective and fair, discovery rules should provide apt penalties in the rules; clearly state that every violation will be enforced; allow the courts a wide range of sanctions to deal fairly with a wide variety of situations; and prevent the erosion of court integrity by dealing with the evasion of court orders more sternly).

118. Rosenberg, *supra* note 117, at 480, 482 (stating the main objective of Rule 37 is to promote free and full disclosure of relevant, non-privileged information, which, as a concept, is widely applauded in the abstract but resisted in practice).

119. *See St. Aubbin*, 329 N.W.2d at 876 (citing City of Fargo v. Candor Constr., Inc., 260 N.W.2d 8, 10 (N.D. 1977) ("[I]f there is too literal an adherence to the 'reach-the-merits' philosophy and sanctions for procedural rules violations are never used, disrespect for the rule is promoted and the purpose of the rule is soon lost.")).

120. 421 N.W.2d 45 (N.D. 1988).

121. *See* Vorachek v. Citizens State Bank, 421 N.W.2d 45, 51, 55 (N.D. 1988) (reversing and remanding a trial court decision that entered a default judgment as a sanction for noncompliance with discovery).

122. *See id.* at 51 (stating the court was unaware of any authority that suggested substantial compliance with discovery is acceptable).

123. *See id.* (citing, as examples, Chubb Integrated Sys. Ltd. v. National Bank, 103 F.R.D. 52, 61 (D.D.C. 1984) and Fautek v. Montgomery Ward & Co., 96 F.R.D. 141, 145-46 (N.D. Ill. 1982)).

124. *See id.*

protection of the interests of all parties to a suit as important interests served when the parties comply with discovery.[125]

The court has further defined and limited the scope and application of discovery abuse sanctions by indicating that the sanctions imposed must be tailored to[126] and proportional to the severity of the conduct.[127] In following this premise, trial courts are vested with broad discretion in imposing appropriate sanctions for abuses of discovery.[128] In *Vorachek,* the North Dakota Supreme Court stated that Rule 37 envisions a "case by case analysis" of all circumstances presented in each particular case and warned against placing too much emphasis on comparisons of cases and the sanctions imposed in those decisions.[129] This will allow a trial court to maintain its discretion in imposing sanctions dependant upon the facts of each particular case.[130]

## III. ANALYSIS

### A. MAJORITY OPINION

In reviewing *Barth v. Barth*[131] on appeal, the North Dakota Supreme Court analyzed the trial court's decision regarding two different issues.[132] The court first reviewed the trial court's division of property and addressed various issues raised by Dale in his brief on appeal.[133] The court then reviewed the trial court's calculation of Dale's income and the role of Rule 37 sanctions in that determination.[134]

#### 1. *The Valuation and Division of Marital Property*

In *Barth,* the North Dakota Supreme Court began its analysis with a survey of North Dakota case law establishing the appellate standard of

125. *See id.* (stating that in order to protect these important interests the most severe sanctions must be available to penalize and deter discovery abuses).

126. *See id.* (recognizing that the degree of a party's disobedience may be considered in determining the severity of the sanction to be imposed).

127. *See* Dethloff v. Dethloff, 1998 ND 45, ¶ 16, 574 N.W.2d 867, 871 (concluding a sanction of default was appropriate and proportional in a case where there was intentional delay, evasion, and nonresposiveness to discovery requests).

128. *See* Vorachek v. Citizens State Bank, 421 N.W.2d 45, 50 (N.D. 1988) (determining that dismissing a case or entering a default judgment is only within the providence of the trial court when the noncompliance has been deliberate or in bad faith).

129. *Id.* at 51.

130. *See id.*

131. 1999 ND 91, 593 N.W.2d 359.

132. *See* Barth v. Barth, 1999 ND 91, ¶¶ 1-37, 593 N.W.2d 359, 361-67.

133. *See id.* ¶¶ 5-21, 593 N.W.2d at 361-64. Dale contended on appeal that the trial court erred in including three quarters of land that he and his father bought on a contract for deed and in excluding Nancy's one-eighth interest in one quarter of land. *See* Appellant's Brief at 7-10, *Barth* (No. 980241).

134. *See Barth,* ¶¶ 22-35, 593 N.W.2d at 364-67.

review for issues regarding the valuation and distribution of marital property.[135] Justice Neumann, writing for a unanimous court, noted that the trial court's valuation and division of property was a finding of fact, and therefore, reversal on appeal would only be granted if the decision was clearly erroneous.[136] In order for the North Dakota Supreme Court to determine that a trial court's division of marital property was clearly erroneous, the trial court's decision must fall into one of three specific scenarios.[137]

The first scenario, leading an appeals court to find a division of marital property as clearly erroneous, is when a decision had been induced by an erroneous view of the law.[138] The second scenario would arise when there was no evidence to support the division.[139] The final scenario would involve a decision where there was some evidence to support the division, but on review of the entire evidence, the appellate court was left with a firm and definite conviction that a mistake had been made.[140] The *Barth* court also stated that in reviewing a marital division of property, it would presume that the trial court's finding of facts were correct, and the complaining party on appeal had the burden of proof to demonstrate that a finding of fact was clearly erroneous.[141]

In order to build a framework from which to analyze Dale's claims, the North Dakota Supreme Court first surveyed statutory and case law requirements of what property should be included in a post-marital division of property.[142] Both case law authority and statutory authority required the inclusion of "*all* of the property accumulated by the parties, both jointly and individually owned."[143] Citing statutory authority,

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135. *See id.* ¶ 7, 593 N.W.2d at 362.

136. *See id.* ¶¶ 7-21, 593 N.W.2d at 362-64. *See generally* N.D. R. CIV. P. 52(a) ("[F]indings of fact, . . . shall not be set aside unless clearly erroneous . . . ."). The North Dakota Supreme Court recently reinforced the clearly erroneous standard of review in three post-marital division of property cases. *See* Gregg v. Gregg, 1998 ND 204, ¶ 13, 586 N.W.2d 312, 315 (reaffirming the equitable distribution doctrine and the standard of review on appeal in an approximately equal post marriage division of property); Kautzman v. Kautzman, 1998 ND 192, ¶ 8, 585 N.W.2d 561, 564 (stating a trial court's determination of equity is presumptively correct absent a finding that the trial court decision was clearly erroneous); Linrud v. Linrud, 1998 ND 55, ¶ 7, 574 N.W.2d 875, 878 (stating that a trial court's findings are presumptively correct with the burden on the complaining party to demonstrate on appeal that a finding is clearly erroneous (citing Zuger v. Zuger, 1997 ND 97, ¶ 6, 563 N.W.2d 804, 806)).

137. *See Barth*, ¶ 7, 593 N.W.2d at 362 (citing *Kautzman*, ¶ 8, 585 N.W.2d at 564).

138. *See id.*

139. *See id.*

140. *See id.*

141. *See id.* (citing *Kautzman*, ¶ 8, 585 N.W.2d at 564; *Linrud*, ¶ 7, 574 N.W.2d at 877; Grinaker v. Grinaker, 553 N.W.2d 204, 208 (N.D. 1996) (explaining the holdings of *Buzick v. Buzick*, 542 N.W.2d 756 (N.D. 1996) and *Fenske v. Fenske*, 542 N.W.2d 98 (N.D. 1996) that trial court findings are presumptively correct unless, on review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake was made)).

142. *See id.*

143. Hoge v. Hoge, 281 N.W.2d 557, 561 (N.D. 1979) (stating that under North Dakota Century

the court stated that all property, regardless of the source, must be included in the post-marital distribution of property.[144] The court relied on *Grinaker v. Grinaker*,[145] where it had previously emphasized that regardless of the method in which the property was acquired, whether brought into the marriage by one party or gifted or inherited as separate property, it "must be included in the marital estate and is subject to distribution."[146]

The court reiterated its holding from *Linrud v. Linrud*[147] that a trial court can only apply the Ruff-Fisher guidelines and properly consider the sources of the property in equitably distributing the marital property after all the assets are included in the marital estate.[148] The court further reaffirmed the *Linrud* holding that when a long-term marriage is involved, an equal division of property is a sensible starting point.[149] Using this starting point, the court began the *Barth* review with the premise that, in reviewing a trial court's property division, an equal division of marital property is the starting point and any disparities in that equal division by the trial court must be explained.[150]

The court first reviewed the trial court's determination of the ownership, valuation, and distribution of the three quarters of land which Dale and Otto Barth purchased on a contract for deed in 1991.[151] Despite conflicting evidence and testimony, the trial court found that Dale owned a one-half interest in the three quarters of land.[152] At trial, Nancy introduced as an exhibit the contract for deed, which reinforced the assertion that Dale owned a one-half interest in the land at issue.[153] Dale maintained that he lacked ownership of the land and stated the only reason his name was on the deed was "for [a] secondary name."[154]

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Code section 14-05-24, a court must consider all property owned by both parties in a post marriage division of property).

144. *See Barth*, ¶ 8, 593 N.W.2d at 362 (citing N.D. CENT. CODE § 14-05-24 (1997); Zuger v. Zuger, 1997 ND 97, ¶ 8, 563 N.W.2d 804, 806).

145. 553 N.W.2d 204 (N.D. 1996).

146. *Grinaker*, 553 N.W.2d at 208.

147. 552 N.W.2d 342, 344 (N.D. 1996).

148. *See Barth*, ¶ 8, 593 N.W.2d at 362 (citing Linrud v. Linrud, 552 N.W.2d 342, 344 (N.D. 1996)).

149. *See id.*

150. *See id.* (citing Kautzman v. Kautzman, 1998 ND 192, ¶ 21, 585 N.W.2d 561, 567).

151. *See id.* ¶¶ 9-13, 593 N.W.2d at 362-63.

152. *See id.* ¶ 9, 593 N.W.2d at 362. Nancy testified at trial that the three quarters of land purchased on a contract for deed was purchased jointly by Dale and Otto Barth and paid for through the sale of cattle and grain. *See id.* Dale testified that he did not own any land, pointing to the fact that he made none of the payments, did not control the land, and that his father, Otto Barth, paid the taxes on the land. *See id.* ¶ 12, 593 N.W.2d at 363.

153. *See id.* ¶ 10, 593 N.W.2d at 362. The contract for deed, executed on December 30, 1991, gave a legal description of the land and recited that it is, "by and between KENNETH PORSBORG and DARLENE PORSBORG, husband and wife, . . . and OTTO BARTH and DALE BARTH, father and son." *Id.*

154. *Id.* ¶ 12, 593 N.W.2d at 363. Dale continued, stating, "The way that was wrote up was for a contract for deed. If there is a default on a payment, that my dad would not have been able to make

The North Dakota Supreme Court referred to *Gregg v. Gregg*[155] to assist it in resolving the dispute between the conflicting evidence regarding the issue of Dale's partial ownership of the land in question.[156] In *Gregg,* the court resolved an appeal of an initial child custody determination and held that making a choice between two permissible views of conflicting evidence is not clearly erroneous.[157] Following that precedent, the court concluded that the trial court's decision that Dale owned a one-half interest in the three quarters of land, valued at the 1991 purchase price, was not clearly erroneous.[158]

The court next considered Dale's complaint that the proceeds from the sale of one quarter of land, in which Nancy had an interest before the marriage, should have been included in the marital estate.[159] The court recognized the general rule that the financial status of divorcing parties, as it exists at the time of commencement of an action, ordinarily should be maintained until the court has time to determine the rights of the parties to that property.[160] However, an exception to this general rule may be triggered in situations where there is an immediate need to cover normal expenses in the transition from married life to single life.[161] The court referred to a 1999 case, *Fox v. Fox,*[162] in which it reiterated that "a disadvantaged spouse is not required to deplete her property distribution in order to live."[163] The court recognized that the current situation was one in which Nancy needed to cover expenses in order to successfully transition herself and the children from married to single life.[164]

North Dakota precedent maintains that the value of transferred assets should be included in the dissipating party's share of the marital property distribution in order to reach an equitable property division.[165] The court in *Barth* distinguished this holding from that of *Linrud* by stating that the mere fact a marital asset had been converted to another form did not mean it had been wasted or that the net marital assets had

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a payment on it in any way, the land would have went back to Porsborgs." *Id.*

155. 1998 ND 204, 586 N.W.2d 312.

156. *See* Barth v. Barth, 1999 ND 91, ¶ 13, 593 N.W.2d 359, 363 (citing Gregg v. Gregg, 1998 ND 204, ¶ 7, 586 N.W.2d 312, 314).

157. *See Gregg,* ¶ 12, 586 N.W.2d at 315.

158. *See Barth,* ¶ 13, 593 N.W.2d at 363.

159. *See id.* ¶ 14. The court noted that the land was sold in 1997, and Nancy received $11,000 for her interest in the land. *See id.* The trial court did not specifically deal with the issue of Nancy's premarital interest in the land or her management of the proceeds from its sale. *See id.*

160. *See id.* ¶ 15.

161. *See id.* Examples include replacing household items, purchasing a car, or moving to another residence. *See id.*

162. 1999 ND 68, 592 N.W.2d 541.

163. *Barth,* ¶ 15, 593 N.W.2d at 363 (citing Fox v. Fox, 1999 ND 68, ¶ 24, 592 N.W.2d 541, 548 (reversing and remanding the trial court's division of marital property)).

164. *See id.*

165. *See* Halvorson v. Halvorson, 482 N.W.2d 869, 870-71 (N.D. 1992) (stating that a party's dissipation of marital assets is a particularly relevant factor in deciding an equitable distribution of a marital estate).

been reduced.[166] The court noted that, at the time of trial, more than one year had passed since Nancy and the children left the family home.[167] The court further noted that all of the proceeds from the sale of Nancy's land were accounted for by Nancy and, therefore, did not constitute fiscal misconduct.[168]

The court distinguished Nancy's dissipation of the proceeds from the sale of her land from the dissipation that occurred in *Bell v. Bell*.[169] In *Bell*, the husband dissipated almost ninety percent of the marital assets through his illegal flight from justice.[170] Conversely, Nancy's use of the proceeds from the sale of land did not materially affect the accumulation or distribution of marital property and therefore, was not considered dissipation or waste by the court.[171] The North Dakota Supreme Court, accordingly, concluded that the trial court did not err in failing to include in the marital estate Nancy's premarital interest in land sold in 1997.[172]

After a review of the trial court record, the North Dakota Supreme Court was not left with a firm and definite conviction that a mistake had been made.[173] Therefore, the court held that the trial court findings concerning the distribution of marital property were not clearly erroneous.[174] The court next examined Dale's claim that the trial court's calculation of his income for the purpose of determining child support was clearly erroneous.[175]

### 2. *The Calculation of Dale's Income*

The court examined three separate claims by Dale with respect to the trial court's calculation of his income.[176] The first claim centered on

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166. *See Barth*, ¶ 16, 593 N.W.2d at 363 (citing Linrud v. Linrud, 552 N.W.2d 342, 345 (N.D. 1996)).

167. *See id.* ¶ 17.

168. *See id.* ¶ 17. Nancy introduced an exhibit at trial showing she spent $8,697 paying bills, repaying debts, paying for babysitting, paying attorney fees, and making a down payment on a car (which the trial court awarded to Nancy along with its attendant debt). *See id.* Nancy further testified the balance of the money was used for "buying clothes and food and whatever since I left Dale, odds and end stuff." *Id.*

169. 540 N.W.2d 602 (N.D. 1995).

170. *See* Bell v. Bell, 540 N.W.2d 602, 603 (N.D. 1995). Kyle Bell was arrested for gross sexual imposition upon children. *See* State v. Bell, 540 N.W.2d 599 (N.D. 1995). After Bell posted $20,000 in bail, purchased a 1988 Buick, and fled to Colorado, thus forfeiting the bond amount, the trial court determined that forfeiting the bond constituted marital waste. *See* Bell v. Bell, 540 N.W.2d at 603.

171. *See Barth*, ¶ 19, 593 N.W.2d at 364 (citing Bell v. Bell, 540 N.W.2d at 605 (awarding all marital assets to wife after the husband distributed 90% of all assets to himself and then dissipated them without regard to his wife or children)).

172. *See id.* ¶ 20.

173. *See id.* ¶ 21.

174. *See id.* ¶ 21.

175. *See id.* ¶ 22.

176. *See id.* ¶¶ 23-36, 593 N.W.2d at 364-67.

the trial court's inclusion of $20,000 in his 1996 income.[177] The second claim concerned the inclusion of grain sales totaling $35,848.19 in his 1996 income.[178] Finally, the third claim dealt with the exclusion of 1997 farm expenses in the amount of $45,271.[179]

The court summarily disposed of the first claim concerning unreported income of $20,000 based on a discrepancy between Dale's testimony at an interim hearing and his 1996 income tax returns.[180] Dale testified he had no income from grain sales in 1996, even though his 1996 tax return showed a deduction of $20,000 for rent.[181] Since Dale took the $20,000 rent deduction, but failed to report income for grain sold in his father's name to pay rent, the deduction was included as income.[182] The court concluded that the inclusion of the $20,000 in unreported income in 1996 did not make the court's determination of income clearly erroneous.[183]

The court also summarily disposed of Dale's second claim, concerning grain sales in the amount of $35,848.19.[184] Once again, conflicting evidence was presented at trial regarding the date that the grain was actually sold.[185] The court stated that there was evidence supporting the trial court's finding concerning the date of sale of the grain.[186] After reviewing the trial court's finding, the court stated that it was not left with a definite and firm conviction that the trial court erred in including the grain sales in the calculation of Dale Barth's 1996 income.[187]

The third of Dale's claims focused on the trial court's refusal to allow him a deduction of $45,271 in 1997 farm expenses.[188] The trial court based its decision to exclude the 1997 farm deductions from Dale's income calculation as a sanction for discovery abuse.[189] The court began its review of this decision by recognizing that North Dakota administrative law provides procedural guidelines in determining a

177. *See id.* ¶ 23, 593 N.W.2d at 364.
178. *See id.* ¶¶ 24-26.
179. *See id.* ¶¶ 27-36, 593 N.W.2d at 364-67.
180. *See id.* ¶ 23, 593 N.W.2d at 364.
181. *See id.*
182. *See id.* Dale stated at trial that he could not come up with the $20,000 cash rent owed to his father, so the grain was sold in his father's name. *See id.*
183. *See id.*
184. *See id.* ¶¶ 24-26.
185. *See id.* ¶ 25. Dale maintained the grain sale took place in 1995, yet sworn testimony by an employee of the Benson-Quinn Elevator stated a check was issued to Dale on January 12, 1996. *See id.*
186. *See id.*
187. *See id.* ¶ 26.
188. *See id.* ¶¶ 27-35, 593 N.W.2d at 364-67.
189. *See id.* ¶ 27, 593 N.W.2d at 364. The trial court found Dale had failed to comply with discovery requests and court orders requiring him to divulge information about his income over the past five years. *See id.*

farmer's income for calculating child support obligations.[190] The court acknowledged that an income calculation based on the exclusion of farm deductions as a discovery sanction would create an artificially high child support obligation.[191] The court found that this consideration was far outweighed, however, by the legitimate purposes of deterring discovery abuses, promoting efficient litigation, and protecting the interests of all litigants.[192] The court constructed a Rule 37 framework within which to analyze Dale's discovery abuses and to answer his claims that the sanctions created an "uncertain, open ended and continuing penalty" and that he "would be paying this penalty every month he pays child support."[193]

Discussing the respective discovery responsibilities of parties, the court reasoned that the information a party provides cannot be selectively or substantially submitted.[194] The court restated the *Vorachek* holding that a party must comply with discovery requests completely, accurately, and promptly.[195] The court stated that its authority to impose sanctions for discovery abuse is grounded in Rule 37 of the North Dakota Rules of Civil Procedure.[196] The court proceeded to delineate the two-part structure and requirements of Rule 37 and indicated the situations in which each respective section applies.[197] The court first emphasized that unless the conduct that is the subject of the motion is justified, the reasonable expenses incurred in making the motion are recoverable at the order of the court pursuant to North Dakota Rule of Civil Procedure 37(a)(4)(A).[198] The court then explained the various sanctions available when a court is faced with the failure by one party to obey an order completely or permit discovery.[199] The court stated that

190. *See id.* ¶ 28, 593 N.W.2d at 365. "Farm businesses may experience significant changes in production and income over time. To the extent that information is reasonably available, the average of the most recent five years of farm operations, if undertaken on a substantially similar scale, must be used to determine farm income." N.D. ADMIN. CODE § 75-02-04.1-05 (1995), *amended by* N.D. ADMIN. CODE § 75-02-04.1-05 (1999) (changing the wording from "farm businesses" to "businesses," "farm operations" to "business operations," and "farm income" to "business income").

191. *See* Barth v. Barth, 1999 ND 91, ¶ 28, 593 N.W.2d 359, 365.

192. *See id.* (citing Vorachek v. Citizens State Bank, 421 N.W.2d 45, 51 (N.D. 1988) (determining that entering a default judgment as a sanction for discovery abuses was an inappropriate sanction as a result of attorney's conflict of interest)).

193. *Id.* ¶ 27, 593 N.W.2d at 364-65 (citing Appellant's Brief at 12, *Barth* (No. 980241)).

194. *See id.* ¶ 29, 593 N.W.2d at 365 (quoting *Vorachek*, 421 N.W. 2d at 51).

195. *See id.*

196. *See id. See generally* N.D. R. CIV. P. 37.

197. *See Barth*, ¶ 29, 593 N.W.2d at 365. The first situation in which a Rule 37 sanction may be imposed is when an order compelling discovery is granted or complied with after the motion is made. *See* N.D. R. CIV. P 37(a). The second situation is when a party fails to obey a court order compelling discovery. *See* N.D. R. CIV. P 37(b).

198. *See id.* (quoting N.D. R. CIV. P. 37(a)(4)(A)).

199. *See id.* (explaining that the sanctions include, but are not limited to: refusing to admit certain claims, prohibiting that party from introducing evidence, striking pleadings, dismissing the action, or

when reviewing sanctions for abuse of discovery, the appropriate standard is an abuse of discretion.[200]

The court noted two justifications for imposing sanctions as a result of noncompliance with discovery.[201] First, the court emphasized deterring future abuse and second, penalizing parties who do not comply with discovery requests.[202] The court emphasized the need for discovery abuse sanctions to be tailored to the abuses alleged and that sanctions are to be sufficiently and proportionally tailored to the severity of the misconduct.[203]

In a survey of the alleged discovery abuse by Dale, the court briefly recited the alleged abuses and a timeline corresponding with those abuses.[204] The court noted that Dale did not dispute the assertions made by Nancy concerning his lack of cooperation and refusal to comply with discovery.[205] The court cited a passage from Nancy's post-trial brief which argued that Dale's 1997 farm expenses should be excluded in his income determination calculation as a sanction for his noncompliance in furnishing the requested information.[206] Concerning Dale's evasiveness on financial matters, the court found it pertinent to note that at trial the court admonished Dale for his behavior.[207]

The court indicated that previous decisions concerning compliance with the rules of discovery mandated that discovery must be timely and complete.[208] The North Dakota Supreme Court concluded that, even though it may have ruled differently, the exclusion of farm expenses by the trial court for Dale's intentional and evasive conduct was an appropriate sanction for his procedural misconduct.[209] The court further

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rendering a default judgment). *See generally* N.D. R. CIV. P. 37(b)(2).

200. *See Barth*, ¶ 30, 593 N.W.2d at 365.

201. *See id.*

202. *See id.*

203. *See id.* (citing Dethloff v. Dethloff, 1998 ND 45, ¶ 16, 574 N.W.2d 867, 871 (stating that the entering of a default judgment, although the ultimate of sanctions, was nonetheless appropriate based on intentional delay, evasion, and nonresponsiveness); Vorachek v. Citizens State Bank, 421 N.W.2d 45, 51, 53 (N.D. 1988) (holding that the entering of default judgment as a sanction for discovery abuses was a reversible error)).

204. *See id.* ¶¶ 31-32, 593 N.W.2d at 365-66.

205. *See id.* ¶ 33, 593 N.W.2d at 366.

206. *See id.* The post-trial brief noted the fact that Nancy did not receive any supporting documentation prior to the date of trial and on the morning of the trial, Dale produced a list of expenses without receipts or other documentation. *See id.*

207. *See id.* ¶ 34. The trial court admonished Dale for making hand signals to his father while his father was being questioned as to the number of cattle on the farm. *See id.* The court interpreted the hand signals to mean "do not answer the question." *Id.*

208. *See id.* ¶ 35, 593 N.W.2d at 367 (citing *Dethloff*, ¶ 14, 574 N.W.2d at 871 (concluding that a default judgment as a sanction for discovery abuse was appropriate due to intentional delay, evasion, and nonresponsiveness); *Vorachek*, 421 N.W.2d at 51 (stating complete, accurate, and timely compliance with discovery rules is required)).

209. *See id.*

determined that the trial court did not abuse its discretion in disallowing the 1997 farm deductions in the calculation of Dale's income.[210]

### B. CHIEF JUSTICE VANDEWALLE'S SPECIAL CONCURRENCE

In a specially concurring opinion, Chief Justice VandeWalle began by stating that he had no doubt that Dale was in contempt of court and that the imposition of sanctions by the trial court was justified.[211] He reiterated that the precedent established in *Dakota Bank & Trust Co. v. Brakke,*[212] allowing a trial court broad discretion to impose sanctions when appropriate, was correct.[213] Chief Justice VandeWalle further agreed that the abuse of discretion standard applies on appeal, and was appropriate in this case.[214]

Despite the propriety of the sanctions, however, he expressed concern regarding the use of the child support guidelines as a sanction vehicle, albeit indirectly, by raising Dale's income and thereby raising his child support obligation.[215] He expressed his concern that "[c]hild support should not be the football tossed between the parents in an attempt to out maneuver one another as they dissolve the family."[216] Chief Justice VandeWalle reasoned that child support had been lifted above the "fray" by legislative action through the Department of Human Services.[217]

Chief Justice VandeWalle further speculated that, notwithstanding trial court discretion, the court would have a difficult time sustaining a child support reduction sanction due to a custodial parent's refusal to comply with discovery in a spousal support or property division action.[218] Noting that other sanctions are available for such egregious conduct, Chief Justice VandeWalle urged trial courts to stay as close as possible to the statutorily promulgated child support guidelines.[219] He ended his concurrence with a message that "[d]istortions of the guide-

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210. *See id.*

211. *See id.* ¶ 39, 593 N.W.2d at 367 (VandeWalle, C.J., concurring specially) (citing Dakota Bank & Trust Co. v. Brakke, 377 N.W.2d 553 (N.D. 1985)).

212. 377 N.W.2d 553 (N.D. 1985).

213. *See Barth*, 1999 ND ¶ 39, 593 N.W.2d 367 (VandeWalle, C.J., concurring specially).

214. *See id.* ¶ 39, 593 N.W.2d at 367 (citing *Brakke*, 377 N.W.2d at 555).

215. *See id.*

216. *Id.*

217. *See id.* (citing Montgomery v. Montgomery, 481 N.W.2d 234, 235 (N.D. 1992) (stating that under the guidelines, determinations of child support are applied by regulatory calculations resulting in presumptively correct amounts)). North Dakota codified the child support guidelines, which statutorily determines child support based on the obligor's net income and the number of children. *See* N.D. ADMIN. CODE § 75-02-04.1 (1999).

218. *See Barth*, ¶ 40, 593 N.W.2d at 367.

219. *See id.* ¶ 41.

lines for one purpose only serve to encourage that distortion for other purposes."[220]

## IV. IMPACT

The decision in *Barth* affirmed the trial court's valuation and distribution of marital property and reinforced the equitable distribution doctrine.[221] Further, the *Barth* decision did not break new ground in the imposition of sanctions for discovery abuses.[222] In fact, the North Dakota Supreme Court recently cited *Barth* in *Mid-Dakota Clinic, P.C. v. Kolsrud*[223] as standing for the proposition that discovery rules require "complete, accurate, and timely" compliance.[224] The citation to *Barth* occurred in an opinion authored by Justice Maring, in which a unanimous court reversed and remanded a trial court decision vacating an order to show cause.[225] The court stated in *Kolsrud* that the court order compelling answers to interrogatories was not void and under Rule 37(b)(2)(D), Appellant Kolsrud could be held in contempt for failing to comply with the court order.[226] While this affirmation of the *Barth* holding occurred within the context of a debtor/creditor action, it nonetheless lends authority to the proposition that non-compliance with discovery in North Dakota will result in immediate and oftentimes severe sanctions.[227]

The most significant potential impact of the *Barth* decision stems from the North Dakota Supreme Court's de facto affirmation of the trial court's use of child support as a vehicle for sanctions, a concern voiced by Chief Justice VandeWalle in his concurrence.[228] As Chief Justice VandeWalle indicated, the court would be "hard pressed" to impose a child support reduction sanction on the custodial parent when the parent's refusal to comply with discovery concerned an income calculation

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220. *Id.*

221. *See id.* ¶ 21, 593 N.W.2d at 364 (stating that upon a review of the record the court was not left with a definite and firm conviction that a mistake had been made).

222. *See id.* ¶ 36, 593 N.W.2d at 367 (concluding that the calculation of income was not clearly erroneous in light of Rule 37 sanctions). *See, e.g.*, Dethloff v. Dethloff, 1998 ND 45, ¶ 14, 574 N.W.2d 867, 871 (concluding that the ultimate sanction of default was appropriate because of "intentional delay, evasion, and non responsiveness" to discovery requests that was characterized by the court as "extreme, persistent, and willful").

223. 1999 ND 244, 603 N.W.2d 475.

224. *See* Mid-Dakota Clinic, P.C. v. Kolsrud, 1999 ND 244, ¶ 16, 603 N.W.2d 475, 480 (determining Rule 69 allows post judgment discovery absent a return of an unsatisfied writ of execution).

225. *See id.* ¶ 1, 603 N.W.2d at 476. The Supreme Court directed the trial court to issue a bench warrant for the arrest of Margaret Kolsrud requiring her to appear and answer why she should not be held in contempt for disobeying the trial court's orders. *See id.*

226. *See id.* ¶ 22, 603 N.W.2d at 480.

227. *See generally* N.D. R. CIV. P. 37.

228. *See* Barth v. Barth, 1999 ND 91, ¶ 39, 593 N.W.2d 359, 367 (VandeWalle, C.J., concurring specially).

determination or division of property.[229] The decision may suggest that child support can be the "carrot on a stick" hung in front of parents, custodial and non-custodial, in order to force compliance with discovery requests—a proposition found inappropriate in at least one other jurisdiction.[230] The conditioning of visitation or custody might also act as an incentive to parents in order to compel discovery—a proposition also found inappropriate.[231]

Furthermore, the *Barth* decision seems to allow the possibility that an innocent party, the children, could be negatively impacted as a result of their parent's discovery abuses—an idea also explicitly rejected in another jurisdiction.[232] If the discovery abuse sanction creates an artificially high child support award, the non-custodial parent most likely will be unable to make payment and as a result, the child may receive little or no financial support.[233] By reaffirming the trial court's potentially erroneous income determination for the computation of child support, the North Dakota Supreme Court may have unknowingly contributed to the eventual creation of a "deadbeat" dad.[234]

The ability of a non-custodial parent to pay child support is usually not predicated on a willingness to pay, but rather on an income level that

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229. *See id.* ¶ 40.

230. *See In re* Marriage of Peper, 554 P.2d 727, 731 (Colo. Ct. App. 1976). The Colorado court held that while the temporary abatement of spousal support may be an appropriate sanction incident to contempt, the temporary abatement of child support is not. *See id.* The distinction between spousal support and child support can be justified because the abatement of spousal support punishes the party responsible for the behavior whereas the temporary abatement of child support could in effect punish the children for acts of their parents. *See id.*

231. *See* Pace v. Solomon, 715 So. 2d 1155, 1156 (Fla. Dist. Ct. App. 1998). The court determined that, despite the defiance of repeated court orders mandating visitation, the transfer of custody as a sanction is inappropriate. *See id.* The court further stated that "[a] mere suggestion by a party seeking enforcement of a contempt motion that a transfer of custody is an appropriate 'punishment' for the contempt is not an acceptable substitute for providing notice that a hearing on custody will be taking place." *Id.* at 1156-57.

232. *See* Edwards v. Edwards, 634 So. 2d 284, 285 (Fla. Dist. Ct. App. 1994) (holding that it was reversible error to punish a party who was not responsible for a discovery violation).

233. *See* Appellant's Brief at 13-14, *Barth* (No. 980241). Dale Barth asserted that using the actual income figures he has a net loss of $1,165.40 per month over the last five years and is unable to pay the $452 per month child support payment as required in the judgment. *See id.*

234. *See* Roger J.R. Levesque, *Targeting "Deadbeat" Dads: The Problem with the Direction of Welfare Reform*, 15 HAMLINE J. PUB. L. & POL'Y 1, 32 (1994) (stating that the only information available that discussed the reasons why fathers do not pay child support determined that 66% of the custodial mothers that had received child support orders stated that the reason they had not received payment was the father was unable to pay (citing General Accounting Office, *Interstate Child Support: Mothers Receiving Less Support from Out-of-State Fathers*, GAO/HRD 92-39FS, Jan. 1992, at 19)).

allows the child support obligation to be met.[235] By imposing a potentially false income based on a sanction for discovery abuses, the court may well have unknowingly overburdened Dale Barth.[236] The problem of overburdening obligors and reducing an already low or middle-income obligor's income is that, statistically, these obligors tend to have the greatest instability in their earnings.[237] Assuming that Dale could afford to meet his child support burden under his current or future farm income, a small disruption may well make the support burden unsustainable.[238] As a result, he may quickly fall prey to arrearages, with the consequence of becoming another non-custodial parent unable to meet his child support obligation.[239] The instability of a farming operation,[240] coupled with the economic downturn in farming in general,[241] might lead to an inability of Dale to make his child support obligation and effectively turn him into a "deadbeat" dad.[242] This could be especially true in light of some scholars' assertions that at lower income levels, existing child support guidelines create unsustainable burdens.[243]

## V. CONCLUSION

In *Barth*, the North Dakota Supreme Court affirmed what at first glance appeared to be a routine appeal concerning the marital division of property and Rule 37 sanctions.[244] However, the majority of the court may not have realized the practical effect that its affirmation of the trial court's decision might have on the entire Barth family. If non-custodial parents are unable to meet their support obligation as a result of discovery sanctions, the financial impact on their children could be

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235. *See* Appellant's Brief at 14, *Barth* (No. 980241) (observing that Dale does not dispute his obligation to pay child support in some amount, evidenced by his paying of $189.00 per month as stipulated in the interim order); *see also* Levesque, *supra* note 234, at 32 (stating that the best indicator of whether a non-custodial parent will receive child support is employment stability of the obligor).

236. *See* Ronald K. Henry, *Child Support at a Crossroads: When the Real World Intrudes Upon Academics and Advocates*, 33 FAM. L.Q. 235, 237 (1999) (discussing current problems related to low and middle income obligors and child support guidelines and the possibility of creating "deadbeat" dads).

237. *See id.* at 242.

238. *See id.*

239. *See id.* (stating a small disruption in earnings due to an already unstable job situation makes another "deadbeat" dad).

240. *See* Appellant's Brief at 3, *Barth* (No. 980241). Dale's farming operation was "dried out" in 1988, "hailed out" in 1989, "dried out" again in 1990, and "hailed out" again in 1991. *Id.*

241. *See* David Rogers, *Senate, House Move on Separate Tracks on $12 Billion in Emergency Spending*, WALL ST. J., Aug. 5, 1999, at A20 (detailing current congressional efforts to increase aid to farmers and "boost a sagging farm economy").

242. *See* Levesque, *supra* note 234, at 32 (stating that instability of employment compounded with low paying job results in low collection rates for low-income fathers); *see also* Appellant's Brief at 14, *Barth* (No. 980241) (stating an inability to pay the amount stipulated based on his actual income).

243. *See* Henry, *supra* note 236, at 263-64.

244. *See* Barth v. Barth, 1999 ND 91, 593 N.W.2d 359, 361.

significant. The importance of complying with discovery requests cannot be understated, because it relates to the integrity and effectiveness of the judicial system; therefore, Dale Barth deservedly should be punished. Whether that punishment would be better served by a one-time fine held in trust to his daughters or in the form affirmed in the Supreme Court decision is a matter for debate.

Several questions remain after the decision in *Barth*. Should punishment of a parent for discovery abuses unwittingly extend to his or her children? Will practitioners in North Dakota see this decision as precedent standing for the proposition that discovery sanctions can be used in an offensive manner, a defensive manner, or both, to affect statutorily promulgated guidelines? Would a custodial parent, sanctioned for discovery abuses, receive the same treatment?

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